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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-249

Filed: 15 August 2017

Mecklenburg County, No. 05 CRS 238682

STATE OF NORTH CAROLINA

v.

JESUS ADAN CRUZ RIOS

Appeal by defendant from order entered 19 January 2016 by Judge W. Robert Bell in Mecklenburg County Superior Court. Heard in the Court of Appeals 7 August 2017.

*Attorney General Joshua H. Stein, by Assistant Attorney General Tracy Nayer, for the State.*

*Appellate Defender Glenn Gerding, by Assistant Appellate Defender Emily H. Davis, for defendant-appellant.*

TYSON, Judge.

Jesus Adan Cruz Rios (“Defendant”) appeals from an order denying his motion to locate and preserve evidence and for post-conviction DNA testing (the “DNA order”). We affirm.

I. Background

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Defendant was convicted by a jury of first-degree murder and sentenced to a term of life imprisonment without possibility of parole on 9 April 2007. On direct appeal, this Court concluded there was no error in the conviction and judgment. *State v. Rios*, 191 N.C. App. 401, 663 S.E.2d 13 (2008) (unpublished), *disc. review denied*, 368 N.C. 688, 781 S.E.2d 604 (2016).

On 9 December 2015, Defendant filed a *pro se* motion to locate and preserve evidence and for DNA testing. The motion was denied without hearing by written order entered 19 January 2016. Defendant filed a *pro se* written notice of appeal in the trial court on 29 August 2016.

The State has moved to dismiss Defendant's appeal due to the untimely filing of his notice of appeal. Defendant claims he originally mailed his notice of appeal to the trial court on 25 January 2016. He asserts he mailed the notice of appeal again in August 2016 after he had not received confirmation that his notice of appeal had been filed by the trial court. Defendant requests we issue a writ of certiorari to review the trial court's DNA order in recognition of the fact that his notice of appeal was not timely. *See* N.C. R. App. P. 4 (appeal may be taken by "filing notice of appeal with the clerk of superior court and serving copies thereof upon all adverse parties within fourteen days after entry of the judgment or order").

In our discretion, we allow Defendant's petition for writ of certiorari but find his appeal to lack merit. The State's motion to dismiss the appeal is denied.

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#### II. Anders Brief

Counsel appointed to represent Defendant on appeal from the DNA order states she is unable to identify any issue with sufficient merit to support a meaningful argument for relief on appeal and asks this Court conduct its own review of the record for possible prejudicial error. Counsel shows to the satisfaction of this Court that she has complied with the requirements of *Anders v. California*, 386 U.S. 738, 18 L. Ed. 2d 493 (1967), and *State v. Kinch*, 314 N.C. 99, 331 S.E.2d 665 (1985), by advising Defendant of his right to file written arguments with this Court and providing him with the documents necessary to do so.

#### III. Issues

Defendant has filed a *pro se* brief with this Court. In his brief, he raises issues related to his trial and not subject to this Court's review on appeal from the DNA order. In his lone argument related to the trial court's DNA order, Defendant appears to argue that, because he was sentenced to life imprisonment without possibility of parole, the Eighth and Fourteenth Amendments to the United States Constitution require that his motion to locate and preserve evidence and for DNA testing be allowed.

#### IV. Analysis

Defendant asserts his life sentence is a *de facto* death sentence and due process will only be satisfied with biological DNA testing of evidence seized prior to his trial.

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Defendant cites no authority to support this proposition. This Court is not aware of any support for Defendant's position.

V. Conclusion

In accordance with *Anders*, we have fully examined the record to determine whether any issues of arguable merit appear therefrom. Our review of potential error in this case is limited to those issues related to the trial court's denial of Defendant's motion to locate and preserve evidence and for DNA testing. We are unable to find any possible prejudicial error concerning the DNA order and conclude Defendant's appeal is wholly frivolous. The trial court's order is affirmed. *It is so ordered.*

AFFIRMED.

Judges CALABRIA and MURPHY concur.

Report per Rule 30(e).